1991

# Richard D. Madsen, and Nancy Madsen, Boyd A. Swensen and Beatrice Swensen, Blaine Anderson and Sheree Anderson, Hope A. Hilton, Cynthia Hilton, Ralph M. Hilton, Gene Helland and the Middle East Foundation v. Mirvin D. Borthick, W. Smoot Brimhall, and John Does I to V, being former Commissioners of the Utah Department of Financial Institutions : Unknown

Utah Supreme Court



R. Paul Van Dam; Attorney General; Stephen J. Sorenson; Assistant Attorney General; Attorneys for Respondents.

Robert J. Debry; Robert J. Debry and Associates; Attorney for Appellants.

IN THE SUPREME COURT OF THE

STATE OF UTAH

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| RICHARD D. MADSEN and NANCY MADSEN, BOYD A. SWENSEN and BEATRICE SWENSEN, BLAINE ANDERSON and SHERREE ANDERSON, HOPE A. HILTON, CYNTHIA HILTON, RALPH M. HILTON, GENE HELLAND and THE MIDDLE EAST FOUNDATION,<br><br>Plaintiffs/Appellants,<br><br>vs.<br><br>MIRVIN D. BORTHICK, W. SMOOT BRIMHALL, and John Does I to V, being former Commissioners of the Utah Department of Financial Institutions,<br><br>Defendants/Respondents. | MEMORANDUM IN OPPOSITION TO PETITION FOR REHEARING<br><br>Case No. 19704 |

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## TABLE OF AUTHORITIES

## POINT I

**PETITIONERS' ARGUMENTS WERE NOT PRESERVED IN THE TRIAL COURT**

Brimhall's Ex Parte Motion For Enlargement of Time... admits that these matters were never raised in the trial court.

> When the undersigned counsel reviewed the Court's decision in Madsen II, he simply did not recall or realize that Mr. Brimhall was not named as a defendant in Madsen I and did not become a defendant until Madsen II was filed. . . (Id. at p. 2.)

In the trial court, Brimhall's Motion for Summary Judgment casually mentioned, in passing, that Brimhall had not been named as a party in Madsen I. However, Brimhall certainly did not make that an issue in the trial court.

Because that issue was not raised in the trial court, it cannot be argued on appeal. See e.g. Lane v. Messer, 731 P.2d 488 (Utah 1986).

## POINT II

**MATTERS NOT RAISED DURING THE APPEAL SHOULD NOT BE CONSIDERED UPON REHEARING**

During the briefing in this court, Brimhall again mentioned, in passing, that he had not been named a party in Madsen I. (Brief of Resp. at p. 2.) However, Brimhall certainly did not make that an issue on appeal.

It seems to be a universal rule that an appellate court will not consider issues on rehearing that were not raised in the original hearing. See e.g. Wernberg v. State, 519 P.2d 801 (Ala. 1974); Imperial County v. McDougal, 564 P.2d 14 (Cal. 1977); State v. Kahua Ranch, Limited, 390 P.2d 737 (Haw. 1964); In re: Shirk's Estate, 401 P.2d 279 (Kan. 1965); Cannon v. Taylor, 493 P.2d 1313 (Nev. 1972); Vanek v. Kirby, 454 P.2d 647 (Ore. 1969).

## POINT III

### BRIMHALL TOOK AN INCONSISTENT POSITION BEFORE THIS COURT.

On rehearing, Brimhall argues that he was not a party in Madsen I. However, during the briefing on the merits, Brimhall took a contrary position. Brimhall relied, in part, on the doctrine of res judicata. However, res judicata only works if the parties in Madsen I and Madsen II were identical. Thus, Brimhall argued:

> Commissioner Borthick was a named defendant in the earlier case, and clearly a state official such as Commissioner Brimhall is a privity with the state, which was also a defendant in Madsen I. [Citation omitted.] The plaintiffs in the two cases are the same. [Emphasis added.]

(Brief of Resp. at p. 19.)

Thus, for purposes of strategy, Brimhall conceded that he was a party in Madsen I. Brimhall should not be permitted to switch theories at this late stag. See Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co., 143 P.2d 278, 104 Utah 498 (1943).

## CONCLUSION

This case is nearly six years old. Literally at the twenty-fourth hour, Brimhall now seeks to switch his position and raise issues for the first time. The Petition for Rehearing should be denied.

DATED this 24 day of February, 1989.

ROBERT J. DEBRY & ASSOCIATES
Attorney for Plaintiff

By _____
ROBERT J. DEBRY

MAILING CERTIFICATE

I certify that on the 24 day of February, 1989, I mailed a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO PETITION FORE REHEARING,(Madsen, et al. v. Borthick, et al) postage prepaid, by depositing a copy of the same in the U.S. mail, to the following:

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MA-001/jc